THE LEGALITY AND EFFICACY OF THE NATIONAL BASKETBALL ASSOCIATION SALARY CAP

I. INTRODUCTION

The National Basketball Association ("NBA") is a joint venture[1] comprised of twenty-seven teams.[2] While most teams are owned by corporate entities, control is often exercised by "a single dominant owner who is usually the majority stockholder."[3] The NBA is in a favorable position to market its product; with twenty-seven teams located in large population markets and a playing season that spans almost seven months, the NBA has many opportunities to expose its sport to a wide audience.[4] Although the NBA has been economically stable in the 1990s, during the late 1970s and early 1980s, the league had to overcome a variety of financial problems which reduced its profitability and threatened the continued existence of the league itself.[5]

The NBA team owners and players addressed the NBA's fiscal concerns in their 1983 Collective Bargaining Agreement ("1983 Agreement").[6] In the 1983 Agreement, both parties agreed to institute a "salary cap,"[7] the purpose of which was to moderate player salaries and stabilize the league financially.[8] By agreeing to create a uniform salary structure, the NBA players not only restricted their potential earning capacity, but also placed the same restrictions on players who would enter the

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[1] PAUL D. STAUDOHAR, THE SPORTS INDUSTRY AND COLLECTIVE BARGAINING 91 (1986). A joint venture can be defined as "a group which undertakes an economically productive activity in concert in order to overcome the impracticability of any one member's amassing sufficient capital for the project or in order to eliminate the economic waste involved in duplication of effort." Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 HARV. L. REV. 1531, 1536 (1958).

[2] The NBA has expanded to 27 teams by adding franchises in Miami and Charlotte in 1988, and in Minneapolis-St. Paul and Orlando in 1989. Chris Baker, *League Popularity Seems to Reach for the Stars*, L.A. TIMES, Nov. 8, 1988, part 8, at 1.

[3] STAUDOHAR, *supra* note 1, at 91.

[4] *Id.* at 88-89.

[5] *Id.* at 88. For a discussion of the financial problems that the NBA faced in the late 1970s and early 1980s, see *infra* notes 18-23 and accompanying text.

[6] For a discussion of the 1983 Agreement between NBA owners and players, see *infra* notes 24-26 and accompanying text.

[7] The term "salary cap" refers to the concept that each NBA team "has a salary pool beyond which it normally can't spend." Brenton Welling et al., *Basketball Business Is Booming*, BUS. WK., Oct. 28, 1985, at 72, 78. For a discussion of the NBA salary cap, see *infra* notes 24-32 and accompanying text.

[8] STAUDOHAR, *supra* note 1, at 109.

league in the future.[9]

In its inaugural season, the legality of the salary cap was challenged. In *Wood v. National Basketball Ass'n*,[10] O. Leon Wood, a college basketball player, alleged that the salary cap operated as a restraint of trade and therefore was a violation of section 1 of the Sherman Anti-Trust Act (the "Sherman Act").[11] The thrust of Wood's claim was that players with similar talents were receiving disproportionate salaries due to their respective teams' ability to alter their salary structure to accommodate incoming players. In rejecting Wood's claim, the Second Circuit stated that the salary cap was not "the product solely of an agreement among horizontal competitors but [was] embodied in a collective agreement between an employer or employers and a labor organization reached through procedures mandated by federal labor legislation."[12]

As it exists today, the NBA's salary cap is a complex document which often requires the league office to interpret whether or not certain transactions are permissible.[13] When the current collective bargaining agreement expires in 1994, NBA players will push for a discontinuance of the salary cap.[14] This Note explores the development of, and the continued need for, the salary cap by analyzing its legal implications as well as its contribution to the financial stability and popularity of the NBA today. Part II discusses the NBA's need for a salary cap and its proper calculation. Part III analyzes the effect that the antitrust laws and national labor policy have on the operation of a professional sports industry. Part IV discusses the *Wood* challenge to the legality of the NBA's salary cap provision. Part V demonstrates the effectiveness of the salary cap as the main component in the fiscal stabilization of the NBA. Finally, Part VI concludes that the salary cap, a complex innovation whereby owners and players essentially share revenues, has been the single most important factor

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9 *See infra* notes 111-17 and accompanying text.

10 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987). For a discussion of this case, see *infra* Part IV.

11 Sherman Anti-Trust Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (1988)).

12 *Wood*, 809 F.2d at 959.

13 Because of his ability to interpret the salary cap, Gary Bettman, the NBA's general counsel, has been "called God by more than one general manager." Gary Binford, *Wolves' Bailey is a Real Pearl*, N.Y. DAILY NEWS, Mar. 24, 1992, at 70.

14 Charles Grantham, the executive director of the NBA Players Association, has stated that "[w]hen we were approached with the idea in the early 1980s, it was very apparent the league was having financial difficulties. Now, I think it has outlived it's [sic] usefulness." William D. Murray, *NBA and its Players Reach Accord on Creative Accounting*, UPI, Feb. 14, 1992, *available in* LEXIS, Nexis Library, UPI File.

in the revival of the NBA as a profitable joint venture and will continue to allow the NBA to prosper.

II. The Need for a Salary Cap and Its Proper Calculation

One primary factor in the financial success of an NBA team is the number of spectators which the team attracts to its games.[15] Generally, the demand to see a team play is a function of how successful the team is in terms of its record of wins and losses.[16] Therefore, in order to attract spectators to its games, a team's management will try to get the best players to play for its team, with the hope that the team will win more games than it loses. For this reason, the best players are in great demand and the owners tend to spend large sums of money to acquire their services.[17]

In the late 1970s and early 1980s, the NBA's financial problems began when team owners, in an attempt to lure the best players to their respective teams, offered "free agents"[18] higher salaries than the owners could afford.[19] Although a superstar player could be a significant factor in the financial success of a team, the payment of higher salaries resulted in a sharp increase in a team's operating costs.[20] Several NBA teams consistently lost money during this period. According to current NBA Commissioner David J. Stern,[21] the NBA "consider[ed] folding four teams '[Cleveland Cavaliers, Indiana Pacers, Utah Jazz, and Kansas City Kings] and there were [two to four] teams for sale that could not find buyers at any price."[22] The financial situation of the league as a whole was getting worse—something had to be

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15 Staudohar, *supra* note 1, at 89. Other factors include "the team's success, costs of operation, the club's tax liability, and how efficiently the franchise is managed." *Id.*

16 *Id.*

17 *Id.*

18 The term "free agents" refers to those players who, after having fulfilled their contractual obligations with their teams, have the opportunity to offer their services to any team in the league.

19 Staudohar, *supra* note 1, at 89. During this period, the increases in some teams' gross income did not proportionately keep pace with the inevitable increases in player salaries. *Id.*

20 *Id.*

21 David J. Stern has been the NBA Commissioner since 1984. A graduate of Columbia University Law School, Commissioner Stern became the NBA's first general counsel in 1978 when he moved from the New York law firm of Proskauer Rose Goetz & Mendelsohn to the NBA league office. *See* Baker, *supra* note 2. *See* Welling, et al., *supra* note 7, at 75, 78.

22 William D. Murray, *NBA Pulls Out of Recession*, UPI, Nov. 1, 1986, *available in* LEXIS, Nexis Library, UPI File. In the case of the Cleveland Cavaliers, then owner Ted Stepien "paid enormous salaries to free agents and traded away draft choices only to acquire a team with players of limited skills." Staudohar, *supra* note 1, at 89-90.

done.[23]

In 1983, the NBA team owners and the National Basketball Players Association ("NBPA") reached an agreement unprecedented in any professional sport—the moderation of players' salaries through the limiting of the aggregate amount of money that each team could spend on its players.[24] The focal point of the negotiations was the introduction of the salary cap. While the owners wanted to place a $4 million ceiling on each team's player payroll, the NBA players, who demanded to receive a share of league revenues, were undecided as to how to calculate the salary cap and when it should officially take effect.[25] The 1983 Agreement established a ceiling on team payrolls while guaranteeing the players fifty-three percent of the league's defined gross revenues.[26]

In its simplest form, the salary cap is computed by multiplying the league's revenues, less benefits, by fifty-three percent and then dividing that figure by twenty-seven, the number of teams currently in the league.[27] However, starting with the 1990-91 NBA season, the salary cap computation was altered to reflect an amount that would be set aside to create a pre-pension benefit

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[23] As of 1983, losses per NBA team averaged $700,000. STAUDOHAR, *supra* note 1, at 109.

[24] Memorandum of Understanding Between National Basketball Association and National Basketball Players Association, Apr. 18, 1983, *reprinted in* MARTIN E. BLACKMAN & PHILIP R. HOCHBERG, REPRESENTING PROFESSIONAL ATHLETES AND TEAMS 195-225 (1983) [hereinafter Memorandum of Understanding].

[25] STAUDOHAR, *supra* note 1, at 110. While the owners demanded that the players agree to a salary cap, "[the players'] contract demands included a share in the percentage of future cable television revenues, guarantees on all contracts, and increases in pensions and severance pay." *Id.* at 109. On March 31, 1983, after months of negotiations, the NBA team owners agreed to guarantee that players' salaries would reflect a fixed percentage of the league's gross revenues. *Id.* at 110-11.

[26] Sam Goldaper, *Salary Cap Helps Reshape N.B.A.*, N.Y. TIMES, Oct. 26, 1984, at A25. *See* Memorandum of Understanding, *supra* note 24, § III (C)(1), at 202-03. Defined Gross Revenues shall include, without limitation:

> (i) regular season gate receipts, net of admission taxes;
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> (ii) proceeds from the sale, license or other conveyance of the right to broadcast or exhibit NBA pre-season, regular season and playoff games on radio and television including, without limitation, network, local, cable and pay television, and all other means of distribution, net of reasonable or customary expenses related thereto;
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> (iii) exhibition game proceeds, net of admission taxes and all reasonable or customary game, pre-season and training camp expenses;
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> (iv) playoff gate receipts, net of admission taxes, arena rentals and all other reasonable or customary expenses except the player playoff pool.

Id. § II (B)(1)(a), at 197. As a result of the 1983 Agreement, the players controlled their own salary structure; the more excitement they generated by attracting new spectators, the greater their salaries would increase.

[27] Memorandum of Understanding, *supra* note 24, § III (C)(1)(b), at 203.

plan for the NBA players.[28] The terms of the Pre-Pension Benefit Plan ("PPBP") established that

> a portion of the players' 53% of Defined Gross Revenues for each season will be used to fund the PPBP. Payment of a player's PPBP benefit will commence the year after he retires from the NBA (or at age 30, whichever comes later) and will end when he turns 50, when the regular players' pension plan comes into effect.[29]

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[28] NBA Memorandum Discussing NBA Player Pre-Pension Benefit Plan (on file with the *Cardozo Arts & Entertainment Law Journal*).

[29] *Id.* The effect of the PPBP on the NBA salary cap will depend on several factors. The determination of the PPBP contribution for each NBA season is as follows:

> The total PPBP payments to be made by Teams for a season will equal the amount (up to a maximum of 8% of Defined Gross Revenues for the preceding season), if any, by which 53% of actual Defined Gross Revenues exceeds the total paid to all players in Salaries and Benefits, increased by 5%. Thus, PPBP payments will be made only when, and to the extent that, the aggregate amount of player Salaries and Benefits is less than the 53% of Defined Gross Revenues owed to the players.
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> The mechanism for creating this "shortfall" in Salaries and Benefits—and thus causing an amount to be available to fund a contribution to the PPBP—is the so-called "Pegged Caps." These Pegged Caps . . . are predetermined Salary Caps for each season through the 1993-94 season which, based on current revenue projections, will be below the Salary Caps and Minimum Team Salaries that would otherwise be applicable to ensure that the players receive their 53% of Defined Gross Revenues (under the "old" way of calculating the Salary Cap).
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> Assuming that the Pegged Cap for a given season is, in fact, less than the Salary Cap based on 53% of projected Defined Gross Revenues, use of the Pegged Cap in computing the Salary Cap should result in aggregate Salaries and Benefits which are less than 53% of actual Defined Gross Revenues. However, if there is no "shortfall" at the end of the season—because, for example, some Teams have far exceeded the Pegged Cap by resigning their own free agents—*no* PPBP contribution will be made, despite the fact that there will have been a lower Salary Cap and Minimum Team Salary during the season.

Id.

This new pre-pension benefit plan causes each season's salary cap to reflect one of two amounts—the "Calculated Cap" or the "Pegged Cap." The Calculated Cap is computed the "old" way: 53% of projected Defined Gross Revenues, less Benefit payments, plus or minus certain "carryover" adjustments, divided by the number of non-expansion Teams in the League, increased by 5%.

> The Pegged Caps are:
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> $11.7 million in 1990-91
> $12.5 million in 1991-92
> $13.3 million in 1992-93
> $14.2 million in 1993-94
>
> If the Calculated Cap for a season is greater than the Pegged Cap, then the Salary Cap for that season will be based on the Pegged Cap . . . . If, however, the Calculated Cap is less than the Pegged Cap, then the Salary Cap will be the same as the Calculated Cap.
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> Thus, the Pegged Caps are *not* "guaranteed" caps; they are only utilized if a Salary Cap based on 53% of the projected Defined Gross Revenues (i.e., the Calculated Cap) would be *greater* than the Pegged Cap.

Id.

Last year, the NBA and the NBPA agreed to a settlement in a dispute involving unreported gross revenues by the league and its teams which impacted on the amount

The 1983 Agreement represented a type of "profit-sharing" plan for the NBA players.[30] Because the amount of money available to pay players' salaries increased as the gross revenues of the league increased, the players had an incentive to make the games as exciting as possible in order to attract more spectators and generate interest among the networks for a larger national television contract.[31] The players did not have much of a downside risk with the 1983 Agreement; while it placed a ceiling on a team's player salaries, it also established a *minimum* payroll which the teams had to meet.[32]

III. The Antitrust and National Labor Policy Effect on the National Basketball Association

A. *The Sherman Act*

Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[33] In addressing the issue of restraint of trade, the Sherman Act purports to "be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade . . . [and] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources."[34] While this prohibition seems to include all contracts and combinations, courts have construed section 1 of the Sherman Act as preventing only those which "unreasonably" restrain competition.[35]

The Supreme Court has adopted two tests to determine

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individual teams could pay in salaries. *Teams Get Higher Salary Caps*, N.Y. Times, Feb. 10, 1992, at C4. The settlement raised the Pegged Caps from $13.3 million to $14 million in 1992-93 and from $14.2 million to $15 million in 1993-94. *Id.*

30 Staudohar, *supra* note 1, at 111.

31 *Id.*

32 *Id.* at 112. The 1983 Agreement established that each team was required to have a minimum payroll equal to approximately 90% of the team's salary ceiling. *Id.* However, that computation has been altered so that the current minimum team salary that is guaranteed to the players is computed by dividing the salary cap by 105% and then multiplying that number by 85%. *See* NBA Pre-Pension Benefit Plan, *supra* note 28.

33 Sherman Anti-Trust Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (1988)).

34 Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958) ("preferential routing" clauses are *per se* unlawful restraints of trade in violation of the Sherman Act).

35 *Id.* at 5 (citation omitted). In Chicago Bd. of Trade v. United States, 246 U.S. 231 (1917), the Supreme Court stated:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby pro-

whether a particular practice constitutes an unreasonable restraint of trade: the *per se* test and the rule of reason test.[36] The principle of *per se* unreasonableness refers to the proposition that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[37] The use of the *per se* unreasonable test allows a court to find a section 1 violation without an intricate and lengthy investigation into the industry in question, as well as other related and relevant industries.[38] For example, courts have ruled that practices such as price fixing,[39] division of markets,[40] group boycotts,[41] and tying arrangements[42] are, in and of themselves, unlawful. However, in the professional sports industry, courts consistently have refused to apply the *per se* test.[43]

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motes competition or whether it is such as may suppress or even destroy competition.

Id. at 238. *See also* Standard Oil Co. v. United States, 221 U.S. 1 (1911) (regarding the petroleum industry and its products moving in interstate commerce, the combination of the defendants was an unreasonable and undue restraint of trade in violation of the Sherman Act).

[36] LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 166 (1977). As the author notes,

> the governing law has been that the Sherman Act bans all concerted arrangements which are adopted for the purpose of reducing competition, or which, regardless of purpose, have a significant tendency to reduce competition, but that arrangements which are adopted for and tend to achieve other purposes do not fall within the condemnation of the Act merely because of some incidental and inconsequential restraining effect on competition. This general position, however, has been reached, not directly, but through two subsidiary rules, the rule of reason and the *per se* doctrine . . . .

Id.

[37] *Northern Pac. Ry.*, 356 U.S. at 5.

[38] *Id.*

[39] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (finding that agreements within an industry to fix prices in interstate commerce were *per se* unlawful under the Sherman Act, and that the presentation of a justification for such agreements, based on the desire to eliminate or alleviate such abuses, could not be used as a defense).

[40] United States v. Topco Assocs., 405 U.S. 596 (1972) (holding that a scheme involving the allocation of territories for the purpose of minimizing competition at the retail level is a horizontal restraint that constitutes a *per se* violation of section 1 of the Sherman Act).

[41] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (holding that manufacturers' and distributors' conspiracy not to sell to retail stores, or to do so only on unfavorable terms, is forbidden by the Sherman Act).

[42] International Salt Co. v. United States, 332 U.S. 392 (1947) (where a corporation is the country's largest producer for industrial uses of a product and owns patents on machines for utilizing the product, the requirement that lessees of such machinery use only the corporation's unpatented products is a *per se* violation of section 1 of the Sherman Act).

[43] *See* Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381, 1387 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984); Mackey v. NFL, 543 F.2d 606, 619 (8th Cir. 1976),

The rule of reason test considers three elements in establishing a practice as an unreasonable restraint of trade: (i) an agreement among two or more people or independent business enterprises (ii) that intends to injure or unreasonably restrain competition and (iii) that subsequently causes actual harm to competition.[44] In evaluating the reasonableness of a restraint of trade, courts often consider such factors as the history, purpose and effect of the restraint,[45] the availability of less restrictive means to achieve legitimate, pro-competitive objectives,[46] and the balance struck between pro-competitive and anticompetitive concerns.[47]

According to some critics, the salary cap violates the rule of reason test because of the severe anticompetitive effects it has on player salaries and player mobility.[48] The salary cap has been called a "monopsony price-fixing" arrangement,[49] whereby NBA team owners agree to limit their spending on player salaries in an effort to reduce their input costs while increasing their profits.[50] The effect on player mobility is such that a free agent's options are limited because a team whose aggregate player salaries are above the prescribed salary cap limit cannot bid for new players without reducing its payroll.[51] Further, a team whose payroll is currently below the salary cap can only acquire a new player if signing him will not increase the payroll above the maximum sal-

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cert. dismissed, 434 U.S. 801 (1977); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 503 (E.D. Pa. 1972).

44 Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1296 (9th Cir.), *cert. denied*, 464 U.S. 916 (1983).

45 *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 695 (1978) (the Society's ban on competitive bidding, thereby preventing "all customers from making price comparisons in the initial selection of an engineer, and impos[ing] the Society's views of the costs and benefits of competition on the entire marketplace" cannot be justified under the rule of reason test).

46 *See* Smith v. Pro Football, Inc., 593 F.2d 1173, 1188-89 (D.C. Cir. 1978) (the NFL draft system unreasonably restrained trade in violation of section 1 of the Sherman Act because it was not "demonstrated to have positive, economically *procompetitive* benefits that offset its anticompetitive effects").

47 *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (in analyzing the Chicago Board of Trade's "Call" rule, which prohibited members of the Board from purchasing or selling grain between the close of one session and the beginning of the next session, the Supreme Court stated that the test of legality is whether the restraint imposed promotes or suppresses competition and that the "Call" rule "helped to improve market conditions").

48 Scott J. Foraker, Note, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157, 180-81 (1985) (the salary cap violates the rule of reason test because its anticompetitive effects on player mobility and salaries outweigh any procompetitive effects).

49 *Id.* at 171.

50 *Id.*

51 *Id.* at 172.

ary limit.[52]

Such critics of the salary cap only focus on a narrow view of professional sports competition and fail to consider the "unique economic relationship" shared by member clubs in a professional sports league.[53] In most industries, one business usually achieves success at the expense of another business.[54] However, in a professional sports league each team's financial stability is dependent upon the financial stability of every other league team.[55] For example, in *United States v. NFL*,[56] Judge Grim aptly described football as a "unique type of business" and noted that

> [l]ike other professional sports which are organized on a league basis it has problems which no other business has. The ordinary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitors out of business. The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business.
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> Professional teams in a league, however, must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.[57]

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52 *Id.*

53 Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219, 224 (1984) [hereinafter *Sports Leagues*].

54 Donald G. Kempf, Jr., *The Misapplication of Antitrust Law to Professional Sports Leagues*, 32 DEPAUL L. REV. 625, 628 (1983). *See also* JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS 596 (1979) ("A business firm normally seeks to sell as much of its product as it can and is typically indifferent whether, in doing so, it drives its competition out of business.").

55 Kempf, *supra* note 54, at 628. "While individual manufacturers of food, steel, aluminum and the like may prosper increasingly as other members of their industries go out of business, the opposite is true of a professional sports league; each league member is itself jeopardized when other teams go out of business." *Id.* at 630.

56 116 F. Supp. 319 (E.D. Pa. 1953).

57 *Id.* at 323. According to Judge Robert Bork,

> [t]he members of a league cannot compete in the way that members of other industries can. It is neither in the interests of the members of the league nor of the public generally that the more efficient teams should drive out the less

In its most basic form, a professional sports league is not a conspiracy; to label and treat a sports league as such is "to force results which are unlikely to achieve any purpose intended by Congress."[58] Professional sports teams are *not* economic competitors—the competition between such teams is limited to the athletic field.[59] The NBA salary cap should not be governed by section 1 of the Sherman Act for two reasons. First, since NBA league teams do not economically compete with one another, the NBA and its salary cap should not be subjected to the same legal principles designed to constrain anticompetitive activity within other industries,[60] nor treated as if they were independent competing enterprises.[61] Second, as will be discussed below, since the NBA salary cap is the result of collective bargaining between NBA team owners and the NBPA, it does not violate the antitrust laws.

B. *Collective Bargaining*

The economic interdependence of the NBA franchises necessitates joint economic action off the field.[62] As one commentator noted, "[a]greements limiting economic competition 'are essential to the effectiveness and sometimes to the existence of many wholly beneficial economic activities.' "[63] In the profes-

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efficient. If one team goes out of business, all are endangered. This suggests that the concept of business competition may be irrelevant as applied to the relationships between members of a league.

Robert H. Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. SEC. ANTITRUST L. 211, 233 (1959). *See also* North Am. Soccer League v. NFL, 670 F.2d 1249, 1253 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982) ("[T]he economic success of each franchise is dependent on the quality of sports competition throughout the league and the economic strength and stability of other league members.").

58 WEISTART & LOWELL, *supra* note 54, at 758.

59 Roberts, *Sports Leagues*, *supra* note 53, at 231. "[I]n order to become revenue-generating, productive economic entities, member clubs must surrender their status as individual autonomous entities with independent decision-making authority and become integrated parts of a league." *Id.* Two circuit courts have stated that league member teams are not economic competitors. *See* Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381, 1391 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984) ("Section 1 of the Sherman Act was designed to prevent agreements among competitors which eliminate or reduce competition and thereby harm consumers. Yet . . . the NFL teams are not true competitors, nor can they be."); Smith v. Pro Football, Inc., 593 F.2d 1173, 1178-79 (D.C. Cir. 1978) (stating that "the NFL clubs . . . are not *competitors* in any economic sense").

60 WEISTART & LOWELL, *supra* note 54, at 757-58.

61 Kempf, *supra* note 54, at 633.

62 Congress has recognized the economic interdependence of professional sports league teams. In a report on the topic of network television broadcasting, the Senate stated that if the weak teams in a league were allowed to get weaker, then the structure and continued existence of the entire league would be threatened. S. REP. No. 1087, 87th Cong., 1st Sess. 3 (1961), *reprinted in* 1961 U.S.C.C.A.N. 3042, 3043.

63 Kempf, *supra* note 54, at 631 (quoting ROBERT BORK, THE ANTITRUST PARADOX 332

sional sports industry these agreements have been the subject of some controversy in the context of collective bargaining.

Collective bargaining is required by the National Labor Relations Act ("NLRA") which "mandates that labor and management resolve all disputes involving wages, hours, or other terms or conditions of employment . . . in private negotiations without substantive government interference."[64] The Supreme Court has given these "mandatory" subjects of bargaining an expansive interpretation, including such subjects as "hiring hall" proposals,[65] pension plans,[66] and the elimination of jobs.[67] Section 8(d) of the NLRA covers such a wide range of subjects that it can also be said to govern the labor relationship between team owners and professional athletes.[68] The formulation of the collective bargaining mechanism has altered the analysis of whether the an-

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(1978)) ("emphasizing that boycotts or refusals to deal may be essential to the survival of sports leagues"). League teams jointly produce a product that cannot be produced by a single team alone. Therefore, the teams must "refrain from direct, interfirm economic competition and, in fact, do utilize various cross-subsidy devices to compensate for the natural inequities arising from differences in the economic potential of various franchise locations." WEISTART & LOWELL, *supra* note 54, at 757.

64 Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 22 (1986) [hereinafter *Federal Labor*]. Section 8(d) of the NLRA states: "[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . . " National Labor Relations Act, ch. 120, sec. 101, § 8(d), 61 Stat. 136, 142-43 (1947) (codified as amended at 29 U.S.C. § 158(d) (1988)).

65 "A hiring hall agreement would require an employer to hire only persons referred to it by a union and a union to refer applicants on a non-discriminatory basis." WEISTART & LOWELL, *supra* note 54, at 815; *see* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964) (the "contracting out" of work, whereby employees of an existing bargaining unit are replaced with workers of an independent contractor that will perform the same work under similar conditions of employment, is a statutory subject of collective bargaining under section 8(d) of the NLRA).

66 Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948) (retirement and pension plans are "conditions of employment" and are matters for collective bargaining), *cert. denied*, 336 U.S. 960 (1949).

67 Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960) (where a labor union seeks to negotiate for an amendment to its collective bargaining agreement which would prevent an employer from abolishing any positions without the union's consent, a union strike cannot be enjoined on the theory that it is unlawful for the union to seek to bargain about the consolidation or elimination of jobs because such an action concerns "terms or conditions of employment").

68 LIONEL S. SOBEL, PROFESSIONAL SPORTS AND THE LAW 299 (1977). *See also* WEISTART & LOWELL, *supra* note 54, at 787. The labor relationship between the owners and the players is such that

> [t]he terms and conditions of employment of professional athletes in baseball, basketball and football are no longer governed solely by individual contracts but have been supplanted in part by collective bargaining between the leagues and player unions. As a result, national labor policy, rather than antitrust law, is the principal and pre-eminent legal force shaping employment relationships in professional sports.

Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 6 (1971).

titrust laws should be applied to the professional sports industry, in that "the question is no longer whether professional sports are entitled to a special exemption from the antitrust laws where their employment relationships are involved, but whether unions of professional athletes are entitled to special help from the courts and Congress in bargaining with their employers."[69]

The formulation of a national labor policy stands for the proposition that the unionization of employees in a given industry, whereby individuals act through a labor organization freely chosen by a majority of the workers, affords the workers the greatest leverage in their ability to bargain for improvements with respect to wages, hours, and working conditions.[70] Section 9(a) of the NLRA states that "[r]epresentatives . . . selected . . . by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ."[71] When an agreement is signed by "the owners and the players' exclusive bargaining representative, all players within the bargaining unit and those who enter the bargaining unit during the life of the agreement are bound by its terms."[72]

By granting a union the authority to bargain for all of its constituents, the NLRA furthers its main purpose: to encourage effective collective bargaining.[73] If a star player can choose to negotiate his own contract free of the bargaining group, then the resulting union, consisting primarily of marginal players, will be considerably weaker and unable to bargain effectively.[74] There is even a question as to whether a union solely comprised of mediocre athletes can exist.[75] Many of the union benefits extracted

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69 Jacobs & Winter, *supra* note 68, at 6-7.

70 NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) (the imposition of fines upon union members who had crossed picket lines to work during a strike was not a violation of the NLRA because it is essential to allow unions, through reasonable discipline of members who violate membership rules and regulations, to protect themselves against erosion of membership), *reh'g denied*, 389 U.S. 892 (1967).

71 NLRA, ch. 120, sec. 101, § 9(a), 61 Stat. 136, 143 (1947) (codified as amended at 29 U.S.C. § 159(a) (1988)).

72 Wood v. National Basketball Ass'n, 602 F. Supp. 525, 529 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987). *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944) (when an employee is hired after a collective bargaining agreement has been entered into, the "terms of [his] employment already have been traded out").

73 WEISTART & LOWELL, *supra* note 54, at 808.

74 Jacobs and Winter, *supra* note 68, at 9. "The existence of unions in professional sports . . . negates any possibility of individual bargaining except as permitted by the collective bargain." *Id.* In professional sports, it is common for collective bargaining agreements to only deal with the workers' *minimum* terms and conditions of employment, thereby allowing individual athletes the opportunity to negotiate individually for better terms. WEISTART & LOWELL, *supra* note 54, at 808.

75 Jacobs & Winter, *supra* note 68, at 9.

through collective bargaining, such as minimum salaries and travel allowances, benefit the lesser players at the expense of the superstars;[76] these star athletes lose the ability to receive greater benefits for themselves via individual bargaining to subsidize the union's needs.[77]

C. Mackey v. National Football League

Once a bargaining relationship is established, "antitrust policy can never play a serious role in shaping employment terms directly affecting only the parties."[78] The Supreme Court has rendered certain decisions that support an inference that unionized, professional athletes "may no longer challenge league practices as being in violation of the antitrust laws."[79] In order to decide whether an agreement is exempt from the antitrust laws,

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[76] *Id.*

[77] *Id.*

[78] Roberts, *Federal Labor*, *supra* note 64, at 87.

[79] SOBEL, *supra* note 68, at 307. In United Mine Workers v. Pennington, 381 U.S. 657 (1965), the trustees of the United Mine Workers Welfare and Retirement Fund ("UMW") sued defendant coal mining company to recover royalty payments that UMW claimed it was owed under the National Bituminous Coal Wage Agreement of 1950 ("NBCWA"). *Id.* at 659. Defendant coal company cross-claimed against UMW, alleging that the UMW, the trustees, and certain large coal companies conspired to restrain trade in violation of the antitrust laws. *Id.* The alleged conspiracy was contained in the NBCWA, which had been entered into by the UMW and the large coal companies to address the overproduction problem plaguing the coal industry. *Id.* at 659-60. The parties agreed that the solution was to eliminate the smaller coal companies so that the large coal companies could control the market. *Id.* at 660. Therefore, to drive the smaller companies out of business, the agreement provided that large coal companies' employees would receive large wage increases in return for the UMW's promise not to enter into separate collective bargaining agreements with any smaller coal company that did not contain the same increased wages. *Id.* The Supreme Court, in ruling that the agreement between the UMW and the large coal companies was *not* exempt from antitrust laws, stated:

> [A] union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers . . . . But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy.

Id. at 665-66.

In Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965), the Jewel Tea Company, a supermarket chain, alleged that through a clause in the collective bargaining agreement, the Meat Cutters Union and many employers had conspired to limit the marketing hours for the "retail sale of fresh meat" in Chicago. *Id.* at 681. The Supreme Court, in ruling that the collective bargining agreement *was* exempt from the antitrust laws, stated:

> the issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls

there must be an inquiry into whether federal labor policy should preempt federal antitrust policy.[80] Utilizing these prior Supreme Court decisions, the Court of Appeals for the Eighth Circuit deduced three principles to govern the competing labor and antitrust interests.[81]

In *Mackey v. National Football League*,[82] National Football League ("NFL") players challenged an NFL rule, which allowed the league commissioner to require a club acquiring a free agent to compensate the free agent's former club, as being violative of the antitrust laws.[83] The rule, more commonly known as the "Rozelle Rule," was the innovation of then NFL Commissioner Alvin Ray "Pete" Rozelle.[84] The rule had the effect of restricting

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> within the protection of the national labor policy and is therefore exempt from the Sherman Act. We think that it is.

Id. at 689-90.

The *Pennington* decision can be distinguished from the *Jewel Tea* holding. In *Pennington*, the smaller companies were not part of the bargining unit and did not have their interests represented in the negotiations. These factors led the Court to its conclusion that the agreement was not exempt from the antitrust laws. However, the Jewel Tea Company was a member of the bargaining unit, and therefore, had its interests represented during the bargaining process.

In Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975), a general contractor sued a local union, claiming that their collective bargaining agreement violated the antitrust laws because, under the agreement, the contractor agreed to only grant subcontracts for mechanical work to firms that were parties to the union's collective bargaining agreement. *Id.* at 618-19. In ruling that the agreement was *not* exempt from the antitrust laws, the Supreme Court stated that the union agreements with the general contractors "indiscriminately excluded nonunion subcontractors from a portion of the market" and that there is no exemption from the antitrust laws where "a union and a non-labor party agree to restrain competition in a business market." *Id.* at 622-23. Therefore, while labor policy favors the combination of employees to lessen competition for wages and working conditions, the exemption will not apply where a union seeks "to impose direct restraints on competition among those who employ its members." *Id.* at 622.

80 Mackey v. National Football League, 407 F. Supp. 1000 (D. Minn. 1975), *aff'd in part and remanded*, 543 F.2d 606, 613 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

81 *Mackey*, 543 F.2d at 613-14.

82 407 F. Supp. 1000 (D. Minn. 1975), *aff'd in part and remanded*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

83 *Mackey*, 407 F. Supp. at 1002.

84 The Rozelle Rule was adopted by the NFL's member teams in 1963 as an amendment to their Constitution and By-Laws. Section 12.1(H) stated:

> Any player, whose contract with a League club has expired, shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signs a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players, from the Active, Reserve, or Selection List (including future selection choices) of the acquiring club as the Commissioner in his sole discretion deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.

Id. at 1004.

the number of teams that would be interested in potential free agents. The compensation requirement left the team acquiring the free agent subject to the possibility of losing an important player or draft choice because disagreement on compensation would leave the commissioner with the final decision. The threat of losing some players as part of a compensation package altered the bidding for free agents; the NFL players argued that this rule denied them the opportunity of having every team unconditionally bid for their services. In addressing the argument that the "Rozelle Rule" was a restraint of trade in violation of the antitrust laws, the Eighth Circuit developed a three-pronged test:

> First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship . . . . Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining . . . . Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.[85]

Utilizing the three-pronged test, the Eighth Circuit determined that the "Rozelle Rule" constituted an unreasonable restraint of trade, and therefore, violated section 1 of the Sherman Act.[86] First, the court noted that the alleged restraint of trade resulting from the introduction of the "Rozelle Rule" only affected the parties to the agreement.[87] Second, the court found that the "Rozelle Rule" operated as a restriction on a player's ability to move from one team to another and depressed player salaries, and therefore, constituted a mandatory bargaining subject within the meaning of the NLRA.[88] Third, the court determined that there was no bona fide arm's-length bargaining over the rule pre-

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85 *Mackey*, 543 F.2d at 614 (citations omitted). For other cases utilizing the three-pronged test established in *Mackey*, see McCourt v. California Sports, Inc., 460 F. Supp. 904 (E.D. Mich. 1978), *vacated on other grounds*, 600 F.2d 1193 (6th Cir. 1979) (nonstatutory labor exemption to the antitrust laws applies to the reserve system incorporated in the National Hockey League's collective bargaining agreement where the reserve system was incorporated in the agreement as a result of good faith, arm's-length bargaining); Zimmerman v. National Football League, 632 F. Supp. 398 (D.D.C. 1986) (agreement to allow a supplemental draft satisfied all prongs of the *Mackey* test, and therefore the labor exemption to the antitrust laws could properly be applied).

86 *Mackey*, 543 F.2d at 623.

87 *Id.* at 615.

88 *Id.*

ceding the execution of the 1968 and 1970 collective bargaining agreements.[89] Therefore, although the first two prongs were satisfied, the "Rozelle Rule" ultimately failed to receive an exemption from the antitrust laws because there was no bona fide arm's-length bargaining between the parties to the agreement. It is within the above framework that the Second Circuit in *Wood v. National Basketball Ass'n*[90] rendered its decision on the only challenge, thus far, to the NBA's salary cap provision.

IV. CHALLENGE TO THE LEGALITY OF THE SALARY CAP: *WOOD V. NATIONAL BASKETBALL ASSOCIATION*

While the NBA salary cap was designed to help the league escape its financial woes, some players voiced displeasure with the constraints that the salary cap placed on their ability to enter the free agent market and receive compensation for the reasonable value of their services.[91] Players realized that the market for their talent was effectively reduced to those teams that had not exceeded their salary cap limit yet or those teams that were willing to alter the structure of their roster in order to acquire a new player.[92] In 1984, in response to the apparent restrictive market, one player, O. Leon Wood, decided to challenge the salary cap's legality. *Wood v. National Basketball Ass'n*[93] became the test case to evaluate the legality of the NBA salary cap.

Wood, a college basketball player for California State University and a member of the gold medal-winning 1984 United States Olympic basketball squad, sued the NBA alleging that "the [NBA's] college draft [and] maximum team salary rules . . . constitute[d] violation[s] of section 1 of the Sherman Act."[94] Wood, selected by the Philadelphia 76ers in the 1984 NBA College Draft,[95] was looking forward to signing a multi-year contract sim-

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89 *Id.* at 616.

90 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987).

91 Greg Ballard, a former Washington Bullet player, stated that while the new agreement was supposed to benefit all of the players, it really only benefitted the superstar players. David DuPree, *60 Slated to Become Free Agents in NBA*, WASH. POST, Apr. 22, 1984, at C8. Even the so-called superstars objected to how the salary cap operated. Maurice Lucas, a five-time NBA all-star, actively participated in the salary cap negotiations and stated "[t]he system is not working. . . . You either have to be firm and wait it out or sign for whatever they give you. I'd like to sign for my market value." Sam Goldaper, *Salary Cap Helps Reshape N.B.A.*, N.Y. TIMES, Oct. 26, 1984, at A25, A30.

92 *See infra* notes 129-34 and accompanying text.

93 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987).

94 *Id.* at 526. Wood also alleged that the ban on player corporations violated the Sherman Act. *Id.*

95 *Id.* Wood was the 76ers' second pick in the first round (Charles Barkley was their

ilar to the contracts that his contemporaries had signed.[96] Unfortunately, due to salary cap limitations, this type of contract would not be possible.

Because the 76ers were already above their salary cap limit,[97] the 1983 Agreement stipulated that the highest amount it could offer its first-round draft selection was a one-year, $75,000 contract.[98] Although the 76ers asserted that they were prepared to negotiate a long-term contract for more money when they could properly adjust their roster, Wood decided that he wanted to challenge the salary cap provision on the ground that it constituted a *per se* violation of section 1 of the Sherman Act.[99]

Wood claimed that the 1983 Agreement was "illegal because it prevent[ed] him from achieving his full free market value."[100] His contention was that he had suffered irreparable injury because, if he wanted to play in the NBA, his options were limited to either signing a one-year contract with Philadelphia for an amount significantly below that which he could command in the open market or to sit out one full season and not play basketball for any team.[101] He viewed the salary cap "as an agreement

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first pick) and the tenth selection overall. UPI, Sept. 28, 1984, *available in* LEXIS, Nexis Library, UPI File.

96 Michael Jordan, the third pick in the first round of the 1984 NBA Draft, had signed a seven-year, $6.3 million contract with the Chicago Bulls. Bob Sakamoto, *Jordan Gets $28 Million Deal*, CHI. TRIB., Apr. 8, 1988, at C1. Sam Bowie, the second pick in the first round, signed a reported six-year, $5.0 million contract with the Portland Trailblazers. Allen Houston, *Bowie Signs for Reported $5 Million*, UPI, Sept. 25, 1984, *available in* LEXIS, Nexis Library, UPI File.

97 The introduction of the salary cap in 1984-85 limited the aggregate amount that a team could pay all of its players to $3.6 million. *NBA's Easy-Off Salary Cap Approaches $12 Million*, THE SPORTING NEWS, Aug. 27, 1990, at 3 [hereinafter *Easy-Off Salary Cap*]. However, because of existing player contracts, there were five teams that were already above the maximum amount; to remedy this problem, the league decided to create an exception for these teams by "grandfathering in" the teams' respective salaries. Cerisse Anderson, *NBA Salary Cap: Who Wears it and Does it Fit?*, UPI, Mar. 14, 1987, *available in* LEXIS, Nexis Library, UPI File. The term "grandfathering in" refers to the notion that, since there were teams whose salaries already exceeded the maximum limit, these five teams were not required to reduce their payroll to meet the initial salary cap requirements. The teams possessing this exemption and their respective payrolls were as follows:

Los Angeles Lakers	$5,200,000.
New Jersey Nets	$3,750,000.
New York Knickerbockers	$4,600,000.
Philadelphia 76ers	$4,450,000.
Seattle SuperSonics	$4,600,000.

Memorandum of Understanding, *supra* note 24, § III (B)(2,3), at 202.

98 *Wood*, 602 F. Supp. at 526-27. *See* Memorandum of Understanding, *supra* note 24, § III (E)(iii)(f), at 206; Anderson, *supra* note 97.

99 Wood v. National Basketball Ass'n, 809 F.2d 954, 958 (2d Cir. 1987). For a discussion of the *per se* test, see *supra* notes 36-43 and accompanying text.

100 *Id.* at 959.

101 *Wood*, 602 F. Supp. at 527.

among horizontal competitors, the NBA teams, to eliminate competition for the services of college basketball players."[102] Wood also emphasized that "his superior abilities as a point-guard and his selection in the first round of the college draft" should have enabled him to bargain on an individual basis for a greater salary.[103]

Wood thought it was unfair that fellow first-round draft picks such as Michael Jordan and Sam Bowie were able to sign contracts for substantially more money while he did not have the same opportunities simply because the Philadelphia 76ers were already above their salary cap limit.[104] Therefore, the court's decision would have one of two possible outcomes: either Wood would be victorious and the NBA's salary cap would, for all intents and purposes, become obsolete, or his claims would be denied and the salary cap would be legitimated by a judicial decision. Federal labor policy and collective bargaining dictated that the courts choose the latter view.

The *Wood* district court, utilizing the three-pronged test established in *Mackey*,[105] ruled that Wood's antitrust claim must fail because the provisions: (1) affected only the two parties to the 1983 Agreement, namely the NBA owners and the players; (2) "involve[d] mandatory subjects of bargaining as defined by federal labor laws"; and (3) were "the result of bona fide arm's-length negotiations" between the parties.[106] Thus, the district court concluded that due to the protective shield of national labor law, both provisions were not subject to the reach of section 1 of the Sherman Act.[107]

The Second Circuit, in affirming the district court's decision, stated that the salary cap is not "the product solely of an agreement among horizontal competitors but [is] embodied in a collective agreement between an employer or employers and a labor organization reached through procedures mandated by federal

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102 *Wood*, 809 F.2d at 958.

103 *Id.* at 960.

104 *See supra* notes 96-98 and accompanying text. *See also Wood*, 602 F. Supp. at 527. Prior to the lawsuit, Leon Wood did sign a four-year contract with Philadelphia for a reported $1.1 million—a sum substantially below that of other players drafted in the first round of the 1984 NBA Draft. Joe Juliano, *NBA Salary Cap Rule Keeps GMs Hustling*, UPI, Oct. 13, 1984, *available in* LEXIS, Nexis Library, UPI File.

105 For a discussion regarding the three-pronged test of *Mackey*, see *supra* notes 85-89 and accompanying text.

106 Wood v. National Basketball Ass'n, 602 F. Supp. 525, 528 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987).

107 *Id.*

labor legislation."[108] The court emphatically refused to adhere to the notion that the antitrust laws were applicable to Wood's claim. The court stated that "no one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy as set out in the [NLRA],"[109] and therefore, "Wood's claim . . . must be rejected out of hand."[110]

In addressing Wood's contention that his superior basketball skills should have enabled him to bargain individually for a better contract, the Second Circuit found this argument contrary to express federal labor policy and stated that "Wood's theory would allow any employee dissatisfied with his salary relative to those of other workers to insist upon individual bargaining."[111] This, in turn, would operate as a wage and benefit reduction for the other employees because owners would only be able to offer them compensation from a "smaller pie."[112]

The Second Circuit, utilizing section 9(a) of the NLRA,[113] also discussed the fundamental principle that "employees may eliminate competition among themselves through a governmentally supervised majority vote selecting an exclusive bargaining representative."[114] Wood argued that the salary cap provision was illegal because it affected future NBA players (employees) who were currently outside of the bargaining unit.[115] The court stated that this effect is a "commonplace consequence of collective agreements";[116] in fact, section 2(3) of the NLRA "explicitly defines 'employee' in a way that includes workers outside the bargaining unit."[117]

The Second Circuit recognized the importance of freedom of contract in the relationship between professional athletes and

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108 *Wood*, 809 F.2d at 959. Because the Second Circuit believed that federal labor policy governed this dispute, the court stated that it did not have to address the issue of whether the salary cap provision was a *per se* violation of the antitrust laws or a violation using a rule of reason analysis. *Id.* For a discussion of the *per se* test and the rule of reason test, see *supra* notes 36-47 and accompanying text.

109 *Wood*, 809 F.2d at 959.

110 *Id.*

111 *Id.* at 960.

112 *Id.* at 961.

113 NLRA, ch. 120, sec. 101, § 9(a), 61 Stat. 136, 143 (1947) (codified as amended at 29 U.S.C. § 159(a) (1988)). For a discussion of this section and its application to the professional sports industry, see *supra* notes 70-77 and accompanying text.

114 *Wood*, 809 F.2d at 959.

115 *Id.* at 960. *See* Zimmerman v. National Football League, 632 F. Supp. 398, 405-06 (D.D.C. 1986).

116 *Wood*, 809 F.2d at 960.

117 *Id.* "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . . ." NLRA, ch. 120, sec. 101, § 2(3), 61 Stat. 136, 137-38 (1947) (codified as amended at 29 U.S.C. § 152(3) (1988)).

their respective leagues.[118] As long as the collective bargaining relationship follows the prescribed guidelines, then courts should stand clear of the parties and allow them to arrange their affairs in the most efficient manner. The court believed that if it was to intervene and strike down the salary cap provision, then the 1983 Agreement would effectively unravel, thereby forcing both parties to search for other less satisfactory alternatives.[119] Realizing the importance of freedom of contract in the professional sports industry, the court stated that "[i]f Wood's antitrust claim were to succeed, all of these commonplace arrangements would be subject to similar challenges, and federal labor policy would essentially collapse unless a wholly unprincipled, judge-made exception were created for professional athletes."[120] Thus, Wood was unsuccessful in his attempt to have the salary cap provision declared an illegal restraint of trade and violative of section 1 of the Sherman Act.

V. Evaluation of the Salary Cap

An evaluation of the salary cap reveals that its success has surpassed the league's expectations. However, there was an introductory period in which the NBA teams and its owners had to learn how to effectively manage their payroll.[121] It has been argued that in order for teams to reward their most talented and marketable players with large contracts, the tendency has been to trade or release higher-salaried veteran players,[122] and to sign less talented free agents for less money to fill out the remaining positions on a team's roster.[123] Another contention is that this "out with the old and in with the new" theory has diluted the overall quality of NBA basketball.[124]

It also has been argued that one of the salary cap's objectives—to improve the "competitive balance [of the teams] by promoting the ability of financially weaker teams to compete on a

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118 *Wood*, 809 F.2d at 961.

119 *Id.* at 962.

120 *Id.* at 961.

121 Jan Volk, former Boston Celtics' general manager, stated that "[t]he cap has been good for the league. At any one time I might curse it. It's limiting in the opportunities it presents you. You have to be very creative." Welling, et al., *supra* note 7, at 78. *See supra* note 91 and *infra* note 143 for examples of the differing opinions regarding the effectiveness of the salary cap.

122 Bob Ford, *What's Good for the Goose . . .*, The Sporting News, Jan. 16, 1989, at 32. For examples of this progression, see *infra* notes 130-34 and accompanying text.

123 Juliano, *supra* note 104.

124 *Id.*

more equal basis with financially stronger teams"[125]—is "nothing more than wishful thinking on the part of the NBA."[126] The criticism was that because the NBA had "grandfathered in" pre-cap salaries,[127] certain franchises with high-salaried players, such as the Los Angeles Lakers and the Philadelphia 76ers, have continued to follow their pre-salary cap competitive bidding practices, and therefore still retain an advantage over many NBA teams.[128]

First, whenever a business implements a new program, the business usually goes through a period of adjustment while trying to function at its optimal level. At its inception, the NBA salary cap caused teams to search for executives with Houdini-type powers to keep their teams intact. Therefore, before a team could set its goals for player contracts and salaries, it needed to be assured that it had a general manager who was able to keep the team's payroll within the salary cap as well as being an excellent evaluator of talent.[129]

A major component of a team's ability to stay competitive is a steady influx of younger players. The salary cap figures for the first few seasons did inhibit some teams from keeping their "older" and more established players on their respective rosters.[130] Teams had to "free up enough capital" to pay their star players, as well as their incoming college draft selections, the "going rate" for their services. For example, the Seattle SuperSonics' $4.6 million payroll for the 1984-85 season was already over the salary cap limit for that season.[131] Although their pay-

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[125] D. Albert Daspin, Note, *Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap*, 62 IND. L.J. 95, 122 (1986).

[126] *Id.* at 124.

[127] *See supra* note 97.

[128] Daspin, *supra* note 125, at 124.

[129] One writer for United Press International stated: "And now comes the NBA salary cap, that confusing and complicated document that has proven to be the league's stabilizing force, but a wrecker of summer vacations for NBA general managers as well." Juliano, *supra* note 104.

[130] The following figures represent the NBA's salary cap for every year since its introduction:

1984-85	$3.6	million
1985-86	$4.233	million
1986-87	$4.945	million
1987-88	$6.164	million
1988-89	$7.232	million
1989-90	$9.802	million
1990-91	$11.871	million
1991-92	$12.5	million

David DuPree, *Players Likely to Encourage Lifting of Cap*, USA TODAY, Aug. 1, 1991, at C1.

[131] Seattle's 1984-85 season salary cap was determined to be the greater amount of their 1983-84 allowance, $4.6 million, or the league imposed figure of $3.6 million. Memorandum of Understanding, *supra* note 24, § III (B)(2,3) at 202.

roll was "grandfathered in,"[132] Seattle still had problems with the salary cap because it wanted to make some personnel changes; for example, Seattle wanted to acquire a first-round draft pick.[133] The new rule forced the team to trade Gus Williams, one of their most popular players, because his salary was one of the highest on the team.[134]

Second, the argument that certain franchises retain a competitive advantage in bidding for players because their team salaries were "grandfathered in" cannot be currently supported. The 1983 Agreement stipulated that, for the 1984-85, 1985-86, and 1986-87 seasons, the maximum team salary of the five franchises exempt from the salary cap[135] should not exceed the *greater* of the salary figure that each team was allowed to "grandfather in" or the amount that the league would compute for the rest of the member teams.[136] In other words, the five franchises would have a salary cap which reflected their respective "grandfathered in" team salaries unless the league computation for a given season would be greater than these amounts. By the 1987-88 season, when the salary cap had risen to $6.164 mil-

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132 *See supra* note 97.

133 Seattle engaged in a three-way trade on draft day. They acquired Ricky Sobers and the Cleveland Cavaliers' first-round pick, Tim McCormick, while sending veteran guard Gus Williams to the Washington Bullets. Juliano, *supra* note 104.

134 Les Habegger, then the Seattle SuperSonics' general manager, stated:

> We wanted a first-round pick. . . . The only way we could do that was to move a player—and Gus was the guy because of his salary. It was obvious we were going to have to make room in our cap. It was a salary we were going to have to sacrifice that allowed us to sign Tim [McCormick] for something more than the minimum $75,000 . . . . I think the overall purpose of the cap is probably working—that is, to hold teams from going hog wild and getting all the (top) players. Parity is probably going to take place—it probably has. For the league, that's good.

Juliano, *supra* note 104.

The Seattle SuperSonics had more trouble with the salary cap in 1986 when, as the NBA Draft deadline neared, Seattle wanted to trade Jack Sikma and his huge $1.6 million salary in order to free up some money to satisfy Seattle's upcoming draft selection. Kenneth Richardson, *Salary Cap Keeps Sikma From Mavs*, SEATTLE POST INTELLIGENCER, June 18, 1986, at B1. When the Dallas Mavericks were unable to squeeze Sikma's salary into their cap, Seattle had to look for another team to trade Sikma to. *Id.* Seattle finally reached an agreement with the Milwaukee Bucks, whereby in exchange for Sikma and Seattle's 1987 and 1989 second round draft picks, Seattle would receive Milwaukee's reserve center, Alton Lister, and the Bucks' first round draft choices in 1987 and 1989. Glenn Nelson, *A Move for the Future*, SEATTLE TIMES, July 2, 1986, at B1. Seattle officials justified the uneven swap primarily in salary cap terms; by trading Sikma and his $1.6 million annual salary and replacing it with Alton Lister's $300,000 salary, the SuperSonics gained badly needed flexibility under their salary cap. *Id.* at 2. Seattle maintained that the added flexibility afforded them a better opportunity to obtain free agents and also effectively eliminated the salary cap as an obstacle in future dealings. *Id.*

135 *See supra* note 97.

136 Memorandum of Understanding, *supra* note 24, § III (B)(3) at 202.

lion,[137] *all* teams were now allowed to increase their payrolls to this amount. The five teams had lost their special exemption; every NBA franchise was now subject to the same salary restrictions.

The salary cap is the primary reason that the NBA was able to save itself from financial ruin. A decade ago, the NBA was "more destructive than productive";[138] the financial stability of its teams suggested consolidation, not expansion.[139] Prior to the arrival of such stars as Earvin "Magic" Johnson and Larry Bird, the NBA really only had two superstars who attracted spectators—Kareem Abdul-Jabbar and Julius Erving.[140] In the late 1970s and early 1980s, television ratings were low.[141]

Ten years later, the NBA has achieved financial stability through a self-imposed salary cap. The salary cap has had several positive effects on the NBA. First, the NBA's best players are somewhat evenly distributed over all of the teams. By limiting the owners' ability to open their checkbooks to get the twelve greatest players for their teams, the league was sending a message to its teams: small market and geographically undesirable teams would now have the ability to build winning programs because they now had a fair chance to acquire a great player to build their franchises around.[142] According to NBA Commissioner David Stern,

> [t]he big guys were told they couldn't be George Steinbrenner and the little guys were told they couldn't be Calvin Griffith [referring to baseball's most famous spender and penny-pincher, respectively]. What the cap says to owners in bad markets is that they have a chance to win it all, which is the psychological dividend of owning a franchise. You can't tell them they're on a fool's errand and simply farm systems for the guys on both coasts. As a management tool, now everybody is playing with the same chips.[143]

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137 For a list of the salary cap figures for every year since its introduction, see *supra* note 130.

138 Sam McManis, *A New Age for Sport of the '80s*, L.A. TIMES, Nov. 2, 1989, at C1.

139 *Id.*

140 *Id.*

141 *Id.*

142 Jane Gross, *N.B.A.'s Rebuilding Program Is Showing Results*, N.Y. TIMES, Dec. 23, 1984, § 5, at 3. *See* WEISTART & LOWELL, *supra* note 54, at 595-96 ("The goal of 'evenness' in on-the-field competition is promoted to the extent that the playing strength of the respective clubs is balanced.").

143 Gross, *supra* note 142, at 3. Philadelphia 76ers' owner Harold Katz stated: "I believe [the salary cap] has brought sanity back to the NBA. It has created parity and that's what you have to have. It has hurt the [76ers] in certain situations and we've had to make some moves but it has been successful." Juliano, *supra* note 104.

The NBA, like other professional sports, has certain teams which players find more attractive to play for than other teams.[144] Most athletes want to play for a winning team; as a result, weaker teams have trouble attracting the better players.[145] In addition, teams located in metropolitan cities such as New York and Los Angeles are usually able to attract more spectators and raise more revenue than teams located in smaller cities.[146] The salary cap was created to enable those teams in the smaller markets, which previously could only offer salaries well below the cap, to be able to sign a greater number of the more talented players by curtailing the high spending of the rich teams. The restriction placed on the financially sound teams that had been active in the free agency market was that, while they were still able to sign the best players, these teams would have to reduce their payrolls below the salary cap in order to acquire them.[147] The restrictions on player movement are justified because, without such restraints, players would inevitably migrate to the more attractive teams; such a movement would "create an imbalance in team strengths and ultimately undermine fan interest, competition, and revenues."[148]

The salary cap has been successful in allowing the smaller market teams to compete with the larger market teams for player talent. The NBA's finest players have remained somewhat evenly distributed throughout the league; players, for the most part, have not migrated to the larger market teams. While the salary cap may constrain a free agent player from receiving an offer from another team that is commensurate with the reasonable value of his services, the salary cap does allow a player to receive this type of offer from his former team.[149] Due to each team's

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144 WEISTART & LOWELL, *supra* note 54, at 596.

145 *Id.*

146 *Id. See* STAUDOHAR, *supra* note 1, at 89 ("[B]asketball has its rich-poor dichotomy, with teams in New York and Los Angeles having great market advantages over teams in Utah and Sacramento.").

147 STAUDOHAR, *supra* note 1, at 111.

148 Daniel C. Nester, Comment, *Labor Exemption to Antitrust Scrutiny in Professional Sports*, 15 S. ILL. U. L.J. 123, 129 (1990).

149 "[A] team may enter into a new Player Contract . . . with respect to any Veteran Free Agent who last previously played for that Team, without regard to the [salary cap] . . . ." Memorandum of Understanding, *supra* note 24, § III (C)(2)(b) at 203.

If a team wants to acquire a free agent and to renew the contract of a former player during the same period, then the timing of the two transactions becomes an important issue. If a team has room under the salary cap to sign a free agent or to acquire another player via a trade, then in order to sign both players (new player and former player) the team must complete the transaction involving the new player first because the team can sign its former player without regard to the salary cap limit. In other words, if the team signs its former player first, and this signing causes the team's aggregate player salary to

ability to renew the contracts of its own players without regard to salary cap limitations,[150] the needs of both the owners and the players are satisfied. Owners now have a fair shot at retaining their own superstar players in order to have a competitive team for its fans. While players are now faced with the possibility that they will have to accept a lower salary to change teams, they can still receive full compensation for their services from their current teams.

Second, the distribution of talent throughout the league and the heightened competitiveness of games have increased attendance. The competitive balance of the NBA teams is an important factor in evaluating the financial success of the NBA.[151] Generally, "the size of the crowd in attendance at a game and the size of a game's television audience are governed by two somewhat conflicting factors: the closeness of the match between the teams and the likelihood that the ultimate victor will be the team that most fans support."[152] Therefore, to increase the attendance of its games, it is in the best interests of the NBA owners and the league to try to field twenty-seven competitive teams. As stated above, one effect of the salary cap was to keep the most talented NBA players somewhat evenly distributed throughout the league.[153] This distribution of talent has enabled NBA games to be more competitive, and therefore, exciting. As a result, league attendance figures have soared.[154]

Third, the increase in popularity of NBA basketball has made the league an attractive product for the major television

rise above the cap, then the team will be unable to sign the new player. STAUDOHAR, *supra* note 1, at 112. While teams cannot conspire with their own veteran free agents to delay their signings until after they sign other teams' free agents (or acquire other teams' players via a trade), this practice is often an effective management tool. *Id.* In 1984, the Los Angeles Clippers traded forward Terry Cummings to the Milwaukee Bucks for three players whose combined salaries were greater than $1.5 million. Two days after the trade, Los Angeles signed Bill Walton, their own free agent, to a contract for approximately $1.4 million. The main point to emphasize here is that if Los Angeles had signed Walton prior to the trade, then they probably would not have been able to make the trade because their aggregate salary would have been over the salary cap. *Id.*

150 *See supra* note 149.

151 Roger G. Noll, *Professional Basketball: Economic and Business Perspectives*, *reprinted in* PAUL D. STAUDOHAR AND JAMES A. MANGAN, THE BUSINESS OF PROFESSIONAL SPORTS 31 (1991).

152 *Id.*

153 *See supra* notes 142-50 and accompanying text.

154 During the 1989-90 season, the league set an all-time attendance record of 17,368,659 fans. NBA Attendance Chart (1952-91) (on file with the *Cardozo Arts & Entertainment Law Journal*). In fact, the attendance figures for the 1989-90 season showed a seventh consecutive season of growth. Sam Goldaper, *N.B.A. Has Money to Burn in Lean Time*, N.Y. TIMES, Oct. 28, 1990, § 8, at 11. This growth factor is no small accomplishment when one considers the current economic climate as well as the increase in the cost of a ticket to attend most sporting events today.

networks. The NBA has recently generated so much excitement that television bidding for the rights to nationally broadcast the NBA games has reached levels never before achieved.[155] Most NBA teams are built around a superstar player who is very marketable, in that fans all around the country know who he is and for which team he plays. If the salary cap did not exist, only a few teams would have these players;[156] therefore, the television stations would only have a few select games that fans around the country would be interested in watching. The salary cap's distributive effect has afforded the NBA the luxury of having many superstars play in different regions of the country. In addition to having NBA superstars play for teams located in "major markets,"[157] the NBA also has its best players located in cities such as Portland, San Antonio, Salt Lake City, Phoenix, and Cleveland. With many teams possessing a superstar player, the NBA is now in the enviable position where it can be certain that most NBA games will attract a larger audience.[158] Consequently, network television stations can be reasonably confident that most of the games that they broadcast as part of their television package will generate a greater television audience.

Fourth, increased attendance and a lucrative national television contract have enabled most of the NBA owners to claim a profit. Whereas six of the NBA's teams showed a profit in 1981-82, by 1988, according to NBA Commissioner David Stern, approximately twenty of the then twenty-three teams in the league were able to show a profit.[159] To put this in its proper perspective, in 1981 there were four teams that were for sale with no buyers in sight; there was even talk of shrinking the league to twelve teams.[160] The institution of the salary cap has been successful in helping team owners stabilize their franchises financially. The NBA has had such a financial turnaround that, during the 1980s, it was the only professional league to add expansion

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155 In 1989, the National Broadcasting Company ("NBC") agreed to a four-year, $600 million contract to televise NBA games beginning with the 1990-91 season. Norman Chad, *NBC to Pay $600 Million Over Four Years to NBA*, WASH. POST, Nov. 10, 1989, at C1. The $150 million per year price is approximately a 340 percent increase over the Columbia Broadcasting System's ("CBS") $43.3 million per year fee it paid for the previous four seasons. *Id.*

156 For a discussion of this concept, see *supra* notes 142-48 and accompanying text.

157 The term "major market" is being used to refer to large metropolitan cities such as New York, Los Angeles, Chicago, Boston and Philadelphia.

158 *See supra* note 154.

159 Baker, *supra* note 2, at 1.

160 Welling et al., *supra* note 7, at 72.

teams.[161]

Finally, the increased revenue from television and increased attendance has driven the salary cap upward, permitting the players to reap the benefits along with the NBA. The compensation to the NBA players themselves has exceeded any projections of the league. The increased revenue from television contracts[162] and attendance[163] both figure into the players' fifty-three percent of the gross revenue "profit sharing" arrangement; since the advent of the salary cap in 1984-85, the average NBA player salary has risen from $325,000 per year to over $1 million per year.[164] The top ten salaries for the 1990-91 season were all above $2.95 million.[165] The real benefit to players is that the salary cap stipulates a minimum amount that the teams must pay its players;[166]

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161 The NBA added franchises in Miami and Charlotte in 1988, and in Minneapolis-St. Paul and Orlando in 1989. Baker, *supra* note 2, at 1.

162 *See supra* note 155.

163 *See supra* note 154.

164 The following figures represent the average salaries for an NBA player since the introduction of the salary cap:

1984-85	$325,000
1985-86	$375,000
1986-87	$440,000
1987-88	$510,000
1988-89	$600,000
1989-90	$725,000
1990-91	$925,000

Easy-Off Salary Cap, *supra* note 97, at 3. The 1991-92 salary cap is $12.5 million per team, which translates into an average salary of over $1 million per player per team. DuPree, *supra* note 130, at C1.

165 The following is a list of the top ten salaries for the 1990-91 season:

1.	John Williams, Cleveland	$5.00 million
2.	Patrick Ewing, New York	$4.26 million
3.	Akeem Olajuwon, Houston	$4.06 million
4.	Chris Mullin, Golden State	$3.30 million
5.	Karl Malone, Utah	$3.25 million
6.	David Robinson, San Antonio	$3.25 million
7.	Sam Perkins, L.A. Lakers	$3.17 million
8.	Magic Johnson, L.A. Lakers	$3.15 million
9.	Danny Ferry, Cleveland	$3.00 million
10.	Michael Jordan, Chicago	$2.95 million

USA TODAY, Sept. 27, 1990, at C6.

166 The following figures represent the aggregate minimum salaries that each team had to pay its players for each given season under the salary cap:

1984-85	None
1985-86	None
1986-87	None
1987-88	$ 5.434 million
1988-89	$ 6.690 million
1989-90	$ 7.935 million
1990-91	$ 9.802 million
1991-92	$10.120 million

DuPree, *supra note* 130, at C1. These minimum salary requirements do not apply to expansion teams until their third year of operation. Miami and Charlotte did not have to

this figure can provide some players with significant benefits.[167]

VI. Conclusion

Athletic teams will be profitable if they pay each athlete an amount that is *less* than the contribution that his skills add to team revenues; they will lose money if they do not.[168] During the late 1970s and early 1980s, increases in revenues did not keep pace with increases in player salaries.[169] The NBA was faced with a host of financial problems which had reduced profitability and had threatened the league's existence.[170] The NBA owners and players realized that something had to be done to restore financial stability.

The 1983 Agreement was the solution. Reached through collective bargaining, it sought to moderate players' salaries by placing a limit on the aggregate amount of money that each team could spend to acquire players.[171] In exchange for their agreement to a salary cap, the players were to be paid based on a "revenue sharing" plan whereby they would be guaranteed to receive as salary a fixed percentage of league gross revenues.[172]

The salary cap has been the most important factor in helping stabilize the NBA financially. Because the salary cap has had the effect of keeping the NBA's best players somewhat evenly distributed throughout the league, NBA games are now more competitive and exciting. The increases in competition and excitement have generated greater spectator interest, both at the arenas and on television.[173]

When the current NBA-NBPA collective bargaining agreement expires in 1994, it is expected that the NBPA will suggest

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meet the minimum requirement until the 1990-91 season; Minnesota and Orlando did not have to meet the minimum requirement until the 1991-92 season. *Id.*

167 John "Hot Rod" Williams represents the ultimate example of a player benefitting from the minimum salary floor. Williams was a free agent after the 1989-90 season and was shopping for the best offer that he could find. The Miami Heat, an expansion team that had been in the league only two years, was looking to sign a talented player that could help their team. Miami made an unbelievable proposal for this above-average player—seven years for $26.5 million. Cleveland, Williams's former team, had to match the offer if it wished to retain the services of Williams, which it did. Miami was in the position to offer this extraordinary amount of money because they were significantly under the minimum salary provision since the cap had risen by almost two million since the previous season. Jack McCallum, *Pass Me The Bread*, Sports Illustrated, Sept. 17, 1990, at 50.

168 Staudohar, *supra* note 1, at 99.

169 *Id.* at 89.

170 *Id.* at 88.

171 Memorandum of Understanding, *supra* note 24.

172 For a discussion of the salary cap, see *supra* notes 24-32 and accompanying text.

173 *See supra* notes 154-55 and accompanying text.

that the salary cap be discontinued.[174] The NBPA will probably argue that while the salary cap has served its purpose in stabilizing the league financially, it has outlived its usefulness because there is no longer a threat of the league collapsing. Because the salary cap has been so instrumental in reviving the NBA, it is doubtful that the NBA owners would give such a concession to the players. The NBPA should realize that, as quickly as the NBA was able to stabilize itself utilizing a salary cap, the financial situation of the league could worsen without such a tool. The salary cap should be included in the 1994 collective bargaining agreement so that the owners and players can continue their commitment to making the NBA the most financially successful professional league.

Jeffrey E. Levine

[174] *See supra* note 14 and accompanying text.